

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

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Before the court are two motions: Petitioners Ted Rookstool and Leah Rookstool's Motion to Order Respondent to Conform to Court's Order (#30¹) and Petitioners' Supplement to Motion for Attorney Fees and Costs (#27).

Petitioners' motion to conform comes after this court's February 14, 2008, order granting Petitioners' motion for summary judgment and denying Petitioner USDA's cross-motion for summary judgment. In its order, the court set aside the Director of the USDA National Appeal Division's Review Determination on a number of grounds. Relevant to the present motion, however, is the court's order that the Director clarify his decision regarding the Farm Service Agency's ("FSA") method for appraising capital improvements on Petitioners' farm.

¹Refers to the court's docket entry number

1 In their present motion, Petitioners argue that the Director failed to comply with this court's
 2 order by failing to honor the appraisal prepared by Greg Ruddell regarding the value of capital
 3 improvements on Petitioners' farm. The court disagrees. In its February 14, 2008, order, the court
 4 ordered the Director to "clarify his decision on remand." (Feb. 14, 2008, Order (#19) at 11:23.)
 5 The court made no statement about what that decision should be or, more specifically, whether the
 6 FSA should adopt Ruddell's appraisal of the capital improvements on Petitioners' farm.
 7 Petitioners' motion to conform is therefore denied.

8 Turning now to Petitioners' supplemental motion for attorney fees, in its September 3,
 9 2008, order, the court awarded Petitioners \$26,796.71 in attorneys' fees and costs. The court,
 10 however, rejected Petitioners' request for \$6,593 in fees incurred to hire Gary Thomas. The court
 11 found that Petitioners had not adequately supported their request by identifying Thomas's
 12 qualifications, the services he provided, or how much he charged for his services. In their
 13 Supplement to Motion for Attorneys Fees and Costs, Petitioners now purport to remedy that
 14 deficiency by presenting what they claim is a letter from Gary Thomas and a billing statement
 15 itemizing his services from 2003 to 2008.

16 The court finds Petitioners have failed to show Thomas's fees are recoverable under the
 17 Equal Justice Access to Justice Act ("EAJA"). The EAJA does not permit a party to recover, as
 18 Petitioners put it, fees incurred to hire a person "in lieu of an attorney . . ." (Suppl. to Mot. for
 19 Att'y Fees & Costs (#27) at 2.)² Title 28 U.S.C. § 2412(d)(1)(A) provides, in pertinent part, "[A]
 20 court shall award to a prevailing party . . . fees and other expenses . . . incurred by that party in any
 21 civil action . . . , including proceedings for judicial review of agency action, brought by or against
 22 the United States in any court having jurisdiction of that action . . ." Subsection (d)(2)(A) defines
 23 "fees and other expenses" as including "the reasonable expenses of expert witnesses, the reasonable

25 ²The Thomas letter similarly purports to show that Thomas acted on behalf of Petitioners: "I attended
 26 the Appeal Hearing representing the Rookstools." (Thomas Letter (#27) Ex. A at 1.)

1 cost of any study, analysis, engineering report, test, or project which is found by the court to be
 2 necessary for the preparation of the party's case, and reasonable attorney fees . . .”

3 In *Merrell v. Block*, 809 F.2d 639 (9th Cir. 1987), the Ninth Circuit considered whether to
 4 award a pro se plaintiff attorney fees under the EAJA after he prevailed in an action against the
 5 United States. After reviewing the EAJA's statutory language, as well as persuasive authority from
 6 the First Circuit, the Ninth Circuit held that the district court did not abuse its discretion in denying
 7 the plaintiff attorney fees. *Id.* at 641-42. Significantly, the court noted that “[f]ees” are
 8 specifically defined in the statute as ‘reasonable attorney fees.’” *Id.* at 642. “This choice of
 9 terminology, standing alone,” the court stated, “leads to the conclusion that Congress intended that
 10 an attorney have been retained for a prevailing *pro se* litigant to recover attorney fees under the
 11 EAJA.” *Id.*

12 While the case at bar does not involve a pro se litigant, rather Petitioner seeks fees incurred
 13 to hire Thomas “in lieu of an attorney,” the court finds *Merrell* and the EAJA's statutory language
 14 controlling. Furthermore, as noted by the Supreme Court in *Kay v. Ehrler* in the context of the
 15 Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. § 1988, restricting fee awards to fees
 16 incurred to hire a third-party attorney serves to ensure the assistance of competent counsel in
 17 vindicating a litigant's rights. *See* 499 U.S. 432, 436-37 (1991). This court finds § 1988's policy
 18 objective similarly persuasive here, where awarding fees incurred to hire a layman could encourage
 19 inadequate representation before administrative agencies.

20 IT IS THEREFORE ORDERED that Petitioners' Motion to Order Respondent to Conform
 21 to Court's Order (#30) is DENIED.

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1 IT IS FURTHER ORDERED that Petitioners' Supplement to Motion for Attorney Fees and
2 Costs (#27) is DENIED.

3 IT IS SO ORDERED.

4 DATED this 11th day of June, 2009.



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7 LARRY R. HICKS
8 UNITED STATES DISTRICT JUDGE
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